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No. 06-117

Supreme Court, U.S.
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In The
Supreme Court of the United States

ERNEST EUGENE BRADY and MARRITTA KAY BRADY, husband and wife; JAMES DEAN BRADY, a single man; FLOSSIE MARIE BRADY, a single woman,

Petitioners,

vs.

ABBOTT LABORATORIES, an Illinois corporation; ROSS PRODUCTS DIVISION OF ABBOTT LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RYLEY CARLOCK & APPLEWHITE
JOHN C. LEMASTER
Counsel of Record
L. WILLIAM STAUDENMAIER
KARA A. RICUPERO
One North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4417
Telephone: (602) 258-7701

Attorneys for the Respondent Abbott Laboratories

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether this Court should deny the Bradys' Petition because the Bradys, who asserted only state common law claims in a case removed to federal court on the basis of diversity jurisdiction, have now asserted for the first time on appeal federal issues for which the Bradys lack standing and statutory claims that they expressly disclaimed in the court of appeals?

Whether this Court should deny the Bradys' Petition because the Ninth Circuit properly applied the common law of Arizona?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Abbott Laboratories, an Illinois corporation, has the following parent corporations:

None.

The following publicly held companies own 10% or more of the stock in Respondent Abbott Laboratories:

None.

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STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Abbott Laboratories, Inc. ("Abbott") responds to the procedural history set out by the Bradys because they failed to include several important procedural facts in their Petition. Pursuant to Rule 15(2), Rules of the Supreme Court, Abbott is required to identify misstatements in the Petition. These omitted facts are material because they establish that this case raises no federal question, that the Bradys expressly waived in the Ninth Circuit most of the arguments they now make in their Petition, and that the other arguments were raised for the first time in the Petition.

First, the Bradys asserted only common law tort claims in their complaint and amended complaint.[1] The Bradys failed to assert a statutory claim under the Arizona Groundwater Code.[2]

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[1] The Bradys asserted common law claims for negligence, nuisance, trespass, conversion, and negligent and intentional affliction of emotional distress seeking compensatory and punitive damages. Only the common law negligence and nuisance claim went to trial because the District Court dismissed the other claims prior to trial.

[2] The Bradys assert in their Petition that Abbott alleged it was immune from liability under the doctrine of reasonable use and under A.R.S. § 45-541. The Bradys' statements are wrong. Abbott argued that the Bradys failed to allege a statutory action under the Groundwater Code. The Code expressly provides that an action may be brought if a person transports groundwater across a sub-basin boundary. Abbott pointed out that the Bradys failed to bring an action under this section because the groundwater pumped by Abbott did not cross a sub-basin boundary.

Second, this action was filed by the Bradys in Pinal County Superior Court. Abbott removed the case to the United States District Court based on diversity jurisdiction under 28 U.S.C. § 1332. No federal question of jurisdiction has ever existed.

Third, on November 9, 2005, before oral argument, the Ninth Circuit issued an order directing the parties to address whether the Ninth Circuit should certify to the Arizona Supreme Court 1) whether A.R.S. § 45-518(A) includes an implied private right of action for damages, and 2) whether the statute includes a right to the maintenance of a groundwater basin's water table at any specified height. [Appendix 1, Order dated November 9, 2005] During oral argument, the Bradys' counsel expressly asked the Ninth Circuit not to certify any issues to the Arizona Supreme Court and also expressly disclaimed any reliance on any statutory claim under the Arizona Groundwater Code.[3] *Brady v. Abbott Laboratories*, 433 F.3d 679, 681 n.1 (9th Cir. 2005).

On December 29, 2005 the Ninth Circuit reversed the District Court and remanded with directions to enter judgment for Abbott. *Id.* at 683. The Court only addressed

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[3] Footnote 1 of the Ninth Circuit's Opinion states in part as follows:

> We note that the Bradys bring only common law tort claims. At oral argument, they expressly disclaimed any reliance on any statutory claim under the Arizona Groundwater Code.

Id.

the first of four issues[4] raised on appeal by Abbott, finding that issue dispositive. *Id.* at 680-81.

II. STATEMENT OF THE FACTS

A. ABBOTT'S CONSTRUCTION ACTIVITIES

Abbott's property is located in Pinal County, Arizona. On this property, Abbott operates a facility that manufactures baby formula. Abbott's property is located across the Maricopa Highway from the Bradys' properties. Both the

[4] On appeal, Abbott raised four issues:

1. Did the District Court err by allowing the Bradys to pursue common law negligence and nuisance claims when Arizona law provides that Abbott may withdraw groundwater to make reasonable use of its property without incurring liability to neighboring landowners?
2. Did the District Court err by granting summary judgment, *sua sponte*, for the Bradys tolling the applicable statute of limitations when the Bradys had actual knowledge of the facts supporting their causes of action more than two years before filing suit?
3. Did the District Court err in awarding compensatory damages for lost profits when the Bradys failed to prove their damages with sufficient certainty as required by Arizona law, and the evidence demonstrated the Bradys never made a profit selling pecans?
4. Did the District Court err by awarding punitive damages when the Bradys failed to show that Abbott consciously disregarded a substantial risk of tremendous harm to the Bradys?

Because the Ninth Circuit did not reach three of the issues raised, even if this Court granted the Bradys' Petition and subsequently reversed the Ninth Circuit, the Bradys' request that the Court "affirm the District Court's Judgment," Petition at 20, is inappropriate. In that event, the case should be remanded to the Ninth Circuit to address the remaining issues raised by Abbott.

Bradys' properties and Abbott's property are located entirely within the Eloy Sub-Basin of the Pinal Active Management Area.

In 1987 Abbott expanded its manufacturing facility by constructing an addition. The project included digging an excavation to construct a basement. Abbott applied for and received an emergency dewatering permit from the Arizona Department of Water Resources ("ADWR") to remove groundwater and prevent it from entering the excavation. In its permit application, Abbott sought approval to remove a total of 2.07 acre-feet of water from the aquifer. Abbott encountered more water than expected when excavation work began. Abbott continued to pump from the excavation to keep it free of water during construction but did not seek an amendment of its permit to authorize the increased quantity of water being pumped. This was an oversight by Abbott and its contractors.

Abbott pumped groundwater from the excavation site until February 3, 1998. Abbott later filed a groundwater withdrawal and use report ("Annual Report") with ADWR, incorrectly stating that Abbott had not withdrawn groundwater during 1997. In 1999, Abbott did not file an Annual Report to document the quantity of water it pumped during construction in January and February, 1998, another oversight by Abbott.

During the first three months of construction, Abbott discharged the groundwater into an on-site retention basin. On November 3, 1997, Abbott redirected the discharge line to a roadside ditch at the front of Abbott's property. Water was allowed to flow into this ditch until it percolated back into the ground. The Bradys presented no evidence that Abbott transported the water for use at any

other location or that the discharged water ever crossed the Eloy Sub-Basin boundary.

B. THE BRADYS AND THEIR PROPERTIES

James Brady and his mother, Flossie Brady, own a house and approximately 25 acres of adjacent farmland in Pinal County. James and Flossie Brady are partners in Brady and Brady Farms, under which James Brady farmed the 25 acres adjacent to their home.

Gene Brady and his wife, Marritta Brady, own a separate house and lot adjacent to James and Flossie Brady's property. Gene and Marritta Brady have five pecan trees for personal use in their yard. Gene and Marritta Brady have never raised crops for commercial purposes on their property.

Both Gene and James Brady have "exempt" wells on their respective properties, as defined by A.R.S. § 45-402(8). These wells may be used only for domestic purposes and for watering up to two acres of land. A.R.S. § 45-454.

Although both James and Gene Brady are lifelong farmers, prior to 1987 neither had grown pecan trees for commercial purposes. In 1987, James Brady planted a pecan orchard on approximately ten acres of the farmland he owned with Flossie Brady. James Brady continued to raise other crops on the remaining 15 acres.

C. ADWR'S AUDIT OF ABBOTT'S GROUNDWATER PUMPING

In March 2000, more than two years after Abbott finished dewatering and James Brady learned of Abbott's activities, the Bradys complained to ADWR about Abbott's pumping. In response to these complaints, ADWR audited Abbott's 1997 and 1998 groundwater pumping activities.

On June 19, 2000, Abbott filed its response to the ADWR audit, estimating that Abbott withdrew approximately 122 acre-feet of groundwater during construction. Abbott explained the basis for its estimate, noting that the groundwater pumping rate was derived from a standard calculation methodology and the information it had available. Abbott documented the basis for its estimates with attachments, including published data and copies of daily field reports prepared by Abbott's construction team.

After submitting the response, Abbott resolved all regulatory issues with ADWR by entering into a Stipulation and Consent Order on September 6, 2000. Abbott then paid a fine of $6,508.50 and filed a revised Annual Report for 1997 and an original Annual Report for 1998.

REASONS FOR DENYING THE PETITION

I. THE BRADYS EXPRESSLY DISCLAIMED AND FAILED TO RAISE THE CLAIMS NOW ASSERTED IN THEIR PETITION.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234, 665 S.Ct. 1399, 1401 (1976). Only in exceptional ~~cases will~~ this Court do so. *Lawn v. United*

States, 355 U.S. 339, 362 n.16, 78 S.Ct. 311, 324 (1958) (holding "[o]nly in exceptional cases will this Court review a question not raised in the court below"); *State of California v. Taylor*, 353 U.S. 553, 557 n.2, 77 S.Ct. 1037, 1040 n.2 (1957) (refusing to address contentions that the Court of Appeals held had been waived because the issues were not briefed and not mentioned in oral argument); *Duignan v. United States*, 274 U.S. 195, 199-200, 47 S.Ct. 566, 568 (1927) (denying review of constitutional question where the issue was "not pressed or passed upon below").

Exceptional circumstances have been found on very limited occasions. This Court has previously found "exceptional" the following circumstances: where an earlier decision was based on a misapprehension of federal constitutional law; where an important issue is reoccurring; and where changes in fact or law have supervened since the decree was entered below. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 552 n.5, 100 S.Ct. 1870, 1876 n.5 (1980) (finding exceptional circumstances permitting consideration where the determination of a Fourth Amendment seizure issue rested "on a serious misapprehension of federal constitutional law," the determination of the question was "essential to the correct disposition of the other issues in the case," the evidentiary record in the trial court was "adequate to permit consideration of the contention," and the material facts were "not disputed."); *Carlson v. Green*, 446 U.S. 14, 17 n.2, 100 S.Ct. 1468, 1471 n.2 (1980) (finding exceptional circumstances to consider whether a remedy was directly available under the Constitution where the respondent did "not object," the issue was "squarely presented and fully briefed," the issue was an "important, recurring issue," and the issue was "properly raised in another petition for certiorari being held pending

disposition of this case"); *Watts, Watts & Co. v. Unione Austrialia Di Navigazlione*, 248 U.S. 9, 20, 39 S.Ct. 1, 2 (1918) (finding justice required the court to consider the "changes in fact and in law which have supervened since the decree was entered below."). The Bradys have failed to assert any exceptional circumstances and no such circumstances exist.

In this case, the Bradys seek review of the Ninth Circuit's decision based on arguments that they expressly disclaimed in the Ninth Circuit. Specifically, the Bradys petition this Court for a Writ of Certiorari based in part on the assertion that the 1980 Arizona Groundwater Code provides a private cause of action.[5] The Bradys, however, filed their complaint against Abbott asserting only common law claims and never amended their complaint to add a private cause of action under the Code.[6] The Bradys never attempted to assert a statutory claim under the Arizona Groundwater Code in any pretrial proceeding or brief, at trial, or in any post trial briefing. On appeal to the Ninth Circuit, the Bradys again never attempted to assert a statutory cause of action under the Arizona Groundwater Code. On the contrary, prior to oral argument, the Ninth Circuit specifically requested that the parties be prepared to address whether that court should certify to the Arizona Supreme Court the question of whether Section 45-518(A) of the Arizona Revised Statutes, the precise statutory section now relied on by the Bradys in their Petition to this Court, includes an implied private right of action for damages.[7] At oral argument, counsel for

[5] Petition at 17.

[6] Appendix B to Petition at 8a, 10a n.1.

[7] Ninth Circuit Order filed November 9, 2005 at Appendix 1 hereto.

the Bradys expressly stated that they were bringing only common law claims:

> We note the Bradys bring only common law tort claims. At oral argument they expressly disclaimed reliance on any statutory claim under the Arizona Groundwater Code. Thus, the question of whether a private right of action for negligence *per se* can be implied under Ariz. Rev. Stat. § 45-518(A) is not before us.

Brady, 433 F.3d at 671 n.1. Not only did the Bradys never raise these statutory issues, but they refused the Ninth Circuit's invitation to do so.

After specifically disclaiming any reliance on the 1980 Groundwater Code, the Bradys now ask this Court to accept their petition and reverse the Ninth Circuit on that very ground. These circumstances are far from those "exceptional" circumstances required to justify granting the Bradys' Petition. Their Petition should thus be denied.

The Bradys also argue that the Petition should be granted on the ground that the Ninth Circuit's holding applying the doctrine of reasonable use conflicts with the provisions of the 1980 Arizona Groundwater Code.[5] This contention is wholly in error, as discussed below, and furthermore was raised for the first time at the eleventh hour. Abbott maintained from the outset of this case that the reasonable use doctrine is determinative of the common law claims asserted by the Bradys. Despite several opportunities to do so, the Bradys never argued that the doctrine conflicted with the Code before trial, at trial, or in any post trial brief. Indeed, the first time the Bradys

[5] Petition at 13.

raised this argument was in their petition to the Ninth Circuit to reconsider its reversal of the District Court. In addition to the plain error of the argument itself, it is untimely, and the Bradys have set forth no "exceptional circumstances" to justify this Court's grant of their Petition.

The Bradys also argue for the first time that federal reserved groundwater rights holders have somehow been denied "equal protection of their State's Groundwater Code"[9], presumably to attempt to gain the Court's attention by using Constitutional buzz words. This new argument, however, was never raised before at any time in this litigation. The Bradys point to no "exceptional" circumstances justifying review of this newly asserted issue. Unlike other cases in which this Court has found that such exceptional circumstances exist, the arguments asserted by the Bradys and the decisions rendered by both the trial court and the Court of Appeals were based solely on the law of the State of Arizona. *Cf. Mendenhall*, 446 U.S. at 552 n.5, 100 S.Ct. at 1876 n.5. No misapprehension of federal law, constitutional or otherwise, exists, and no change in the law has arisen while the appeal was pending. The Arizona State statutory provisions the Bradys now seek to rely on have been in effect for 25 years. In fact, this Court, "for want of a substantial federal question," dismissed an appeal by the Town of Chino Valley from the Arizona Supreme Court's decision in *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324 (Ariz. 1981) ("*Chino Valley II*"), wherein the Arizona Supreme Court held the 1980 Groundwater Code constitutional.

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[9] Petition at i.

Town of Chino Valley, v. City of Prescott, 457 U.S. 1101 (1982). This is one of the primary cases the Bradys rely upon in their Petition. Because *Chino Valley II* raised no substantial federal questions, this case, in which only Arizona common law claims were asserted, likewise raises no substantial federal question. The Petition should be denied for these reasons.

II. THE BRADYS DO NOT HOLD FEDERAL RESERVED WATER RIGHTS, AND THEY LACK STANDING TO ASSERT SUCH RIGHTS ON BEHALF OF OTHERS.

The Bradys make repeated references to "federal reserved groundwater rights holders" in their Petition.[10] They insinuate that they hold such rights without ever explaining the basis for such a claim or offering any facts to support it. In fact, the Bradys do not hold federal reserved groundwater rights. Furthermore, they lack standing to assert such rights. For these reasons, the Bradys' unfounded arguments relating to federal reserved water rights should be rejected by this Court.

A. THE FEDERAL RESERVED WATER RIGHTS DOCTRINE DOES NOT APPLY TO PRIVATE LANDS SUCH AS THOSE OWNED BY THE BRADYS.

The federal reserved water rights doctrine was first announced by this Court in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908). In *Winters*, the Court held that the United States had impliedly reserved water to

[10] Petition at 7, 12-14, 19 and 20-21.

provide for the future needs of Native Americans occupying the Fort Belknap Indian Reservation in Montana. *Id.*, 207 U.S. at 577, 28 S.Ct. at 212. The Court upheld the "power of the [federal] government to reserve the waters and exempt them from appropriation under the state laws." *Id.*

In later cases, the Court applied this doctrine to other types of federal reservations in addition to Indian reservations. For example, in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963), the Court held that the doctrine "was equally applicable to other federal establishments such as National Recreation Areas and National Forests." *Id.*, 373 U.S. at 601, 83 S.Ct. at 1498. In *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062 (1976), the Court applied the doctrine to Devil's Hole National Monument, confirming the United States' intention to reserve sufficient water to preserve a rare fish found only within the monument. *Id.*, 426 U.S. at 141, 96 S.Ct. at 2071. Finally, in *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (1978), the Court applied the doctrine to a National Forest. In all of these cases, the Court held this doctrine was applicable only to federal reservations of land held in federal ownership. As *Cappaert* explains, "*when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose*, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138, 96 S.Ct. at 2069 (emphasis added).

The Bradys' property is undisputedly private land, not a federal reservation withdrawn from the public domain. No evidence in the record of this case suggests that this land was *ever* reserved by the federal government for any purpose, much less that it might still qualify as a federal

reservation or otherwise be entitled to claim a federal reserved water right. Accordingly, the Bradys have no basis for asserting federal reserved water rights on their own behalf.

B. THE BRADYS LACK STANDING TO ASSERT FEDERAL RESERVED WATER RIGHTS ON BEHALF OF PARTIES NOT BEFORE THIS COURT.

Because the Bradys are ***not*** themselves holders of federal reserved groundwater rights, they do not have standing to raise these issues. As such, their Petition should be denied.

This Court has recognized standing as "'perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324 (1984)) (alterations in original). In part, the legal requisite of standing requires that the litigant have a "personal stake" in the position it advances, holding "[a] federal court cannot 'pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights *of litigants in actual controversies.*'" *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 702 (1962) (quoting *Liverpool, N.Y. & P. Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355 (1885) (emphasis added)). The burden is on the party seeking jurisdiction over the question presented to establish, by reference to facts "affirmatively" established "in the record" that the person "'is a proper party to invoke judicial resolution of the dispute.'" *FWP/PBS, Inc.*,

493 U.S. at 231, 110 S.Ct. at 608 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 518, 95 S.Ct. 2197, 2215 (1975); *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226, 7 S.Ct. 552, 552 (1887); *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511 (1884)).

Under this doctrine, "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034 (1953) (holding "[a]part from the jurisdictional requirement [of standing], this Court has developed a complementary rule of self-restraint for its own governance . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others"). This Court has set forth the following rationales for declining to resolve a controversy on the basis of the rights of third parties that are not part of the litigation: (1) that "courts should not adjudicate such rights unnecessarily"; (2) the holders of such rights may either "wish [not] to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not" and; (3) the holders of such rights themselves are usually "the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 2874 (1976). However, the Court will make an exception to this rule *if* "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is *not unnecessary* in the sense that the right's enjoyment will be unaffected by the outcome of the suit . . . [and where] the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* (emphasis added); *see also Chaplin &*

Drysdale v. United States, 491 U.S. 617, 109 S.Ct. 2646 (1989).

Here, the Bradys can neither establish that they have standing individually to assert federal reserved groundwater rights nor that the articulated exception can be applied in order for them to properly assert those rights on behalf of third parties who are not litigants in this action. No basis exists to apply the exception to the ordinary rule of standing for asserting these third party rights because those rights are expressly protected under Arizona law. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (*"Gila River III"*).

Although this Court has not had occasion to address the question of whether the reserved water right doctrine extends to groundwater, the Arizona Supreme Court did so in *Gila River III*. In *Gila River III*, the court addressed two questions. First, the court concluded that the reserved water rights doctrine does extend to groundwater. *Id.*, 989 P.2d at 748. The court then determined that to the extent Arizona's state groundwater laws do not provide sufficient protection for federal reserved groundwater rights, the federal reservation will be entitled to invoke federal law to protect the right. Specifically, the court held that "once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right." *Id.*, 989 P.2d at 750. As a result, even if the doctrine of reasonable use, as applied in the Opinion below, could pose a threat to the legitimate holder of a federal reserved groundwater right, that holder would be entitled to the greater protection of federal law to the extent necessary to fulfill the right.

Therefore, even if the Bradys had any basis for asserting reserved water right claims on behalf of others, the Opinion of the Ninth Circuit in this case poses no threat to legitimate holders of such rights. Accordingly, assertion of such rights in the Petition provides the Bradys no basis for relief from this Court.

III. THE BRADYS' PETITION PRESENTS QUESTIONS OF STATE LAW.

Unless a question of state law is so intertwined with a Federal Constitutional issue as to require the complete disposition of the case by the Supreme Court, this Court will normally decline to decide questions of state law. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015 (1944); *Helvering v. Stuart*, 317 U.S. 154, 63 S.Ct. 140 (1942); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 62 S.Ct. 1173 (1942). This Court generally will not disturb the judgment of a Court of Appeals on an issue that is heavily dependent on an analysis of state law in light of its recognition that federal court judges who deal regularly with questions of state law in their respective districts and circuits are in a better position to determine how state courts would be inclined to decide state law issues. *See, e.g., UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 119 S.Ct. 1380 (1999); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979). Thus, where the lower court's decision is reasonable and where no "plain error" exists, the Supreme Court has generally held that acceptance of the conclusions of the Court of Appeals is necessary. *United States v. Durham Lumber Co.*, 363 U.S. 522, 80 S.Ct. 1282 (1960); *Spiegel's Estate v. C.I.R.*, 335 U.S. 701, 69 S.Ct. 301 (1949).

The Bradys' positions below as well as the new arguments asserted by the Bradys in their Petition to this Court are all based on interpretation of state law. Indisputably, the Bradys asserted only state common law claims. Further, examination of the questions presented to this Court for review makes abundantly clear that the Bradys only address interpretation of the Arizona Groundwater Code and its purported effect on the Arizona common law doctrine of reasonable use.

As discussed below, the Bradys have set forth no plain error, and the Court of Appeals' determination is clearly a correct and reasonable interpretation of State law on this issue. Accordingly, the Court should decline to review this case.

IV. THE NINTH CIRCUIT CORRECTLY RULED THAT UNDER ARIZONA'S COMMON LAW DOCTRINE OF REASONABLE USE ABBOTT COULD PUMP GROUNDWATER TO MAKE REASONABLE USE OF ITS PROPERTY WITHOUT INCURRING LIABILITY TO THE BRADYS.

The Ninth Circuit correctly applied Arizona's "doctrine of reasonable use," governing landowners' rights to percolating groundwater underneath their property. Under this doctrine, Abbott could withdraw percolating groundwater without incurring liability to neighboring property owners whose groundwater supplies are diminished so long as the water was taken to make beneficial use of Abbott's property. The Bradys, on the other hand, have no right to maintain a static level of groundwater beneath their property.

In 1953, the Arizona Supreme Court adopted this doctrine to address landowners' rights to percolating groundwater under their property:

> This rule does not prevent the extraction of groundwater subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. *If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage.*

Bristor v. Cheatham, 255 P.2d 173, 180 (Ariz. 1953) (emphasis added); *see also Chino Valley II*, 638 P.2d at 1328 (the doctrine of reasonable use "is supported by the better reasoned decisions in this country"). The Arizona Supreme Court held that the doctrine "does not prevent any reasonable development of [one's] land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted. . . ." *Bristor*, 255 P.2d at 180; *see also Evans v. City of Seattle*, 47 P.2d 984, 987 (Wash. 1935) (cited with approval in *Bristor*, 255 P.2d at 178) ("The fact is well established that the appellant City was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of extracting the gravel for use."); *Clinchfield Coal Corp. v. Compton*, 139 S.E. 308, 313 (Va. 1927) (the doctrine does not "prevent any reasonable development of his land by mining or the like, although the underground water of neighboring properties may thus be interfered with or diverted"); *Bayer v. Nello L. Teer Co.*, 124 S.E.2d 552, 559 (N.C. 1962) (Defendant using its rock quarry in a legitimate and natural manner "*was not required by law to use the percolating waters, and the fact that it did not use it under those circumstances does not*

make it chargeable with waste") (emphasis added); *Finely v. Teeter Stone, Inc.*, 248 A.2d 106 (Md. 1968) (holding dewatering a quarry, resulting in a lower water table and causing sinkholes on a neighbor's land, was not actionable under the reasonable use doctrine).

In this case, Abbott was making reasonable use of its property by expanding its manufacturing facilities. In doing so, it had to dewater an excavation to build a basement. Even if this dewatering lowered the water table under the Bradys' property, Abbott is not liable for negligence or nuisance under the doctrine of reasonable use. The Ninth Circuit correctly applied this doctrine.

The Ninth Circuit also properly distinguished the case relied on by the Bradys and the District Court, *Farmers Investment Co. v. Bettwy*, 558 P.2d 14 (Ariz. 1976) ("*FICO*"). In *FICO*, a mining company was withdrawing groundwater from property it owned in one location, transporting the groundwater to another location, and using the water at that second location. Because the mining company was not withdrawing the groundwater to make beneficial use of the land from which it was taken and was instead transporting it for use at another location, the Arizona Supreme Court concluded the use was not reasonable. *Id.*, 558 P.2d at 21. The Ninth Circuit properly recognized the *FICO* case has no application here because Abbott was withdrawing the water to make beneficial use of the land from which the water was withdrawn. The doctrine allows a landowner to pump groundwater to dry out excavations to make use of its property. *See, e.g., Evans*, 47 P.2d at 988.

Accordingly, the Ninth Circuit properly applied the common law of Arizona in reversing the District Court.

V. *CHERRY V. STEINER* AND *CHINO VALLEY II* DO NOT CONFLICT WITH THE NINTH CIRCUIT'S OPINION IN THIS CASE.

The Bradys argue that the Ninth Circuit's Opinion conflicts with the Ninth Circuit's 1983 decision in *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983) and the Arizona Supreme Court's opinion in *Chino Valley II* because these opinions allegedly held that the Arizona Groundwater Code "materially changed the old common law doctrine of reasonable use such that groundwater pumpers are no longer immune from liability. . . ." Petition at 13. The Bradys' argument is without merit. The common law doctrine of reasonable use is very much alive in Arizona, and no conflict exists between the Ninth Circuit Opinion in this case and the cases cited by the Bradys.

After the Supreme Court decided *FICO*, a decision that restricted the transportation of groundwater from one property to another, an uproar ensued. *Town of Chino Valley v. State Land Dep't*, 580 P.2d 704, 705-06 (Ariz. 1978) ("*Chino Valley I*"). As a result, the Arizona Legislature first enacted an interim groundwater code to allow the transportation of groundwater that had been occurring prior to January 1, 1977 but which the *FICO* court prohibited. *Id.*, 580 P.2d. at 706. The Legislature enacted this interim legislation because the "application of existing law preventing the transfer of groundwater jeopardizes the economy and well-being of the people of this state and prevents certain necessary distribution of Arizona's groundwater resources." *Id.* In *Chino Valley I*, the Town

attacked the interim groundwater code as unconstitutional. The Arizona Supreme Court rejected the attack. *Id.*

Thereafter, the legislature enacted the Groundwater Code of 1980. The Town of Chino Valley attacked the constitutionality of the 1980 Code as well. *Chino Valley II, supra*. Among other things, the 1980 Groundwater Code allowed transportation of groundwater *within the same sub-basin without the payment of damages*. *Id.*, 638 P.2d at 1326; A.R.S. § 45-541. The 1980 Code also allowed transportation between sub-basins or away from Active Management Areas but damages must be paid for any injury caused. *Id.*; A.R.S. §§ 45-542 – 543.

The Arizona Supreme Court held the 1980 Groundwater Code was constitutional. *Chino Valley II*, 638 P.2d at 1328. The court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." *Id.* The court explained that the usufruct of the water was the right to capture groundwater to the extent it exists beneath one's property:

> The common law concept of absolute ownership of percolating water while it is in one's land gave him the right to abstract from his land all the water he could find there. On the other hand, it afforded him no protection against the acts of his neighbors who, by pumping on their own land, managed to draw out of his land all the water it contained. Thus, the term 'ownership' as applied to percolating water never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself.
>
> * * *

> The right of the owner to ground water underlying his land is to the usufruct of the water and not the water itself.

Id., quoting *Village of Tesquesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 666-67 (Fla. 1979), *cert. denied*, 444 U.S. 465, 100 S.Ct. 453 (1979).

In *Cherry*, land owners again attacked the constitutionality of the 1980 Groundwater Code – this time in federal court. The District Court stated that the Groundwater Code "does recognize the reasonable use doctrine," *Cherry*, 543 F.Supp. 1270, 1276 (D. Ariz. 1982), and it cited *Bristor* for the Arizona Supreme Court's conclusion "that the overlying owner's right is to the *use* of the water, not the water itself." *Id.* at 1278 (emphasis in original). Neither the District Court nor the Ninth Circuit suggested, much less held, that *Bristor's* statement of the common law was no longer valid. Indeed, *Cherry* reinforced the applicability of the common law doctrine of reasonable use.

The District Court in *Cherry* held the Code was constitutional in reliance on the Arizona Supreme Court's opinion in *Chino Valley II*, stating that "the decision explicitly held that *there is no right of ownership in groundwater prior to its capture. A landowner* whose land overlies groundwater has only the right to use of the water, but *maintains no proprietary interest in the actual water.*" *Cherry*, 543 F.Supp. at 1277 (emphasis added). The Ninth Circuit, in turn, stated "[w]e have examined the Arizona cases and agree with the district court that *Chino Valley II* was not a 'startling' and 'unpredictable' change in Arizona property law, *if it represents any change at all.*" *Cherry*, 716 F.2d at 692 (emphasis added).

Thus despite the Bradys' arguments to the contrary, the 1980 Groundwater Code and the *Cherry* and *Chino Valley II* cases support the validity of the doctrine of reasonable use and its application to the facts of this case. The Bradys, like Abbott, have a right to access the common groundwater supply and to "capture" water if it is available. The Bradys do not, however, own the groundwater, and they have no right to prevent any other landowner from accessing the common supply. Because the Bradys' entire case is premised on the idea that they should be entitled to forever maintain groundwater under their property at a depth of 16 feet, their claim must fail. As the District Court stated in *Cherry*,

> [g]roundwater knows no boundaries and may flow under the land of several landowners. *It would be impossible to accord to each overlying landowner the right to the underlying, percolating water*, as withdrawal by one owner necessarily interferes with the enjoyment of the like privilege of other owners.

Cherry, 543 F.Supp. at 1278 (emphasis added), *aff'd*, 716 F.2d at 689. Far from confirming that the Groundwater Code did away with the doctrine of reasonable use, both the District Court and the Ninth Circuit in *Cherry* relied on and reaffirmed the continued validity of that doctrine in deciding the issues before them. Because they did so, *Cherry* is entirely consistent with the Ninth Circuit's Opinion in this case. In fact, one of the goals of the 1980 Groundwater Code was not to do away with the doctrine of reasonable use as the Bradys argue, but a substantial liberalization of the doctrine to allow transportation of groundwater for beneficial uses on other lands. This

transportation to use groundwater to benefit other lands was not allowed under the common law doctrine.

The Bradys' assertion that the doctrine of reasonable use is the "old" law in Arizona is plainly wrong. Indeed, on four separate occasions since *Chino Valley II* was decided, the Arizona Supreme Court has reaffirmed the continued validity of the doctrine of reasonable use. First, in 1992 the court noted that "Arizona law recognized no right to reserve water for some potential future use," and the court then concluded there is "no legally recognized property right in potential, future groundwater use. . . ." *In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442, 451 (Ariz. 1992) ("*Gila River I*"). The court expressly relied on *Chino Valley II* for this conclusion. *Id.*

In 1993, the court again stated that groundwater is subject to the doctrine of reasonable use. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236, 1240 (Ariz. 1993) ("*Gila River II*"). The court did so again in 1999, citing *Bristor* as the basis for the doctrine. *Gila River III*, 989 P.2d at 743 (Ariz. 1999).

Finally, the Court revisited this issue yet again in 2000, when it stated that "a well owner does not own underground water" and "landowners have 'no legally recognized property right in potential future groundwater use'. . . ." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069, 1083 (Ariz. 2000) ("*Gila River IV*") (citing both *Chino Valley II* and *Gila River I*).

These cases represent an unbroken chain of decisions by the Arizona Supreme Court since *Bristor*. The court has repeatedly held that landowners have the right, under the

doctrine of reasonable use, to pump from the common supply of groundwater to make reasonable use of their property, and no neighboring landowner may reserve that common supply for its own future use. The Bradys, however, seek exactly what the Arizona Supreme Court has said they do not have – a right to maintain the common supply of groundwater at a stable level under their property. Because no such right exists under Arizona law, the Ninth Circuit properly reversed the District Court's judgment, and the Bradys' Petition should be rejected. *Chino Valley II*, 638 P.2d at 1328; *see also Cherry*, 543 F.Supp. at 1278.

CONCLUSION

The Bradys expressly waived the arguments they make here or failed to raise the arguments in the courts below. The Bradys do not possess a federally reserved right to groundwater and do not have standing to assert this argument on behalf of others. Finally, the Petition only raises state law issues that the Ninth Circuit correctly decided. The Court should deny the Bradys' Petition.

Respectfully submitted,

RYLEY CARLOCK & APPLEWHITE
JOHN C. LEMASTER
Counsel of Record
L. WILLIAM STAUDENMAIER
KARA A. RICUPERO

One North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4417
Telephone: (602) 258-7701

Attorneys for the Respondent
Abbott Laboratories

APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST EUGENE BRADY, husband; MARRITTA KAY BRADY, wife; JAMES DEAN BRADY, husband; FLOSSIE MARIE BRADY, wife,

Plaintiffs-Appellees,

v.

ABBOTT LABORATORIES, an Illinois corporation (including Ross Products Division of Abbor Laboratories, improperly named),

Defendant-Appellant,

and

ABC ENTITIES, I-X; JOHN/JANE DOES I-X; ROSS PRODUCTS, a Division of Abbott Laboratories, Inc.,

Defendants.

No. 04-15257

DC No. CV-01-00886-JAT
D. Ariz.

ORDER

(Filed Nov. 9, 2005)

Before: FARRIS, TASHIMA, and CALLAHAN, Circuit Judges.

Counsel should be prepared to address at oral argument whether the following question should be certified to the Arizona Supreme Court for decision:

Does the Arizona Groundwater Code, Ariz. Rev. Stat. § 45-518(A), include an implied private right of action for the recovery of damages for the withdrawal of groundwater based on negligence *per se*, and, if so, does that right include a right to the maintenance of a groundwater basin's water table at any specified height?